SUPREME COURT, U. S.

SEP 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-541

BARRY BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

September 24, 1973

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

INDEX

	Page
JUDGMENT AND OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
QUESTIONS PRESENTED FOR REVIEW	2
FACTUAL STATEMENT	3
REASONS FOR GRANTING THE WRIT –	
1. Petitioner was denied due process of law under the Fifth Amendment when he was convicted of the crime of bank robbery solely on "resemblance" identification testimony possibly placing him at locations remote from the bank before and after the robbery; where no witness put him in the bank either by positive or resemblance testimony when he was supposed to be in the bank and there was no other evidence of convictable substance against Petitioner and where there was a substantial likelihood of an in-court irreparable misidentification . . .	10
2. Petitioner was deprived of Due Process of Law under the Fifth Amendment, where the pre-arrest and necessarily pre-trial photographic lineup was so impermissibly suggestive so as to give rise to a very substantial likelihood of an in-court irreparable misidentification under *Simmons v. United States*, 390 U.S. 377 (1968), where Petitioner was the only person in a pre-arrest seven photo lineup who had a heavy mustache and an Afro hair style and where no one identified Petitioner at a subsequent corporeal Lineup, *Foster v. California*, 394 U.S. 440 (1969)	13

Page

3. Petitioner was deprived of Fifth Amendment Due Process of Law by the prosecutor's method of attempting to obtain an in-court identification so as to give rise to a very substantial likelihood of misidentification under *Gilbert v. California*, 388 U.S. 263 (1967), where the in-court identification did not have an independent source but was based on an impermissible in-court suggestion when the prosecutor sequentially (a) showed to the witness the seven photo array, (b) asked the witness to pick out the photo he picked out at the pre-trial photo lineup, and then (c) with the witness having cue-card in hand asked the witness whether the person in the photo was in court, all in the presence of the jury. 16

4. The Court of Appeals may not affirm without opinion where (a) the issues were substantial and nonfrivolous, and (b) the defendant was convicted only on the highly questionable identifications of "resemblance" witnesses whose descriptions of the culprit were inconsistent and irreconcilable. 18

CONCLUSION 23

APPENDIX

Order of Court of Appeals denying rehearing A-1

Order and Opinion of Court of Appeals A-2

Reproduction of Pre-Arrest 7 photo lineup A-4

Reproduction of corporeal lineup A-6

Page

Table of Cases

Brooks v. United States,
146 U.S. App. D.C. 1, 449 F.2d 1077 (1971) 10

Coppedge v. United States,
369 U.S. 438, 447, 448 (1962) 19

Foster v. California,
394, U.S. 440 (1969) 15

Gilbert v. California,
388 U.S. 263 (1967) 16

Harris v. United States,
___, ___ U.S. App. D.C. ___, ___ F.2d
___, No. 71-14818 (1973) 12

Mendoza-Acosta v. United States,
139 U.S. App. D.C. 143, 430 F.2d 516 (1970) 15

Sanders v. United States,
___ U.S. App. D.C. ___, ___ F.2d ___,
No. 72-1534 (1973) 12

Simmons v. United States,
390, U.S. 377 (1968) 14, 16

Stovall v. Denno,
388 U.S. 293 (1967) 16

Wade v. United States,
388 U.S. 218 (1967) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

BARRY BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Barry Bailey, Petitioner herein, respectfully prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 25, 1973.

OPINION BELOW

The two-sentence opinion of the Fourth Circuit Court of Appeals affirmed the judgment of conviction entered by the

United States District Court for the Baltimore Division of the District of Maryland. Said opinion is reproduced *infra* at Appendix A-3.

JURISDICTION

The order of affirmance of the Fourth Circuit Court of Appeals was entered on June 25, 1973, and is reproduced *infra*, at Appendix A-2, 3. Petitioner's petition for rehearing containing a suggestion for an *En Banc* hearing was denied July 25, 1973, said order of denial being reproduced *infra*, at Appendix A-1. This Court extended the time for filing this Petition until September 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution, 5th Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;" U.S.C.A. Const., Amend. 5.

QUESTIONS PRESENTED FOR REVIEW

Whether a defendent is denied Constitutional Due Process under the Fifth Amendment, when he is convicted of bank robbery *solely* "on resemblence" testimony, where no witness placed him in the bank when he was alleged to be therein, where the "resemblance" testimony possibly placed him at points remote from the bank before and after the robbery, where there was no other evidence of convictable substance, and where there is a substantial liklihood of an irreparable in-court misidentification.

2. Whether Petitioner was deprived of Due Process of Law under the Fifth Amendment, where the pre-arrest

and necessarily pre-trial photographic lineup was so impermissibly suggestive so as to give rise to a very substantial likelihood of an in-court irreparable misidentification under *Simmons v. United States*, 390 U.S. 377 (1968), where Petitioner was the only person in a seven photo lineup who had a heavy mustache and an Afro hairstyle and where no one identified Petitioner at a subsequent corporeal Lineup, *Foster v. California*, 394 U.S. 440 (1969).

3. Whether Bailey was deprived of Fifth Amendment Due Process of Law by the prosecutor's method of attempting to obtain an in-court identification so as to give rise to a very substantial likelihood of misidentification where the in-court identification did not have an independent source but was based on an impermissible in-court suggestion, when the prosecutor sequentially (a) showed to the witness the seven photo array, (b) asked the witness to pick out the photo he picked out from the array and (c) then literally asked the witness whether the person in the photo was in court, all in the presence of the jury.

4. A Court of Appeals may not affirm without opinion where (a) the issues were substantial and nonfrivolous, and (b) where a defendent was convicted on highly questionable "resemblance" identifications whose descriptions of the culprits were inconsistent and irreconcilable.

FACTUAL STATEMENT

On April 4, 1972, approximately 11:45 a.m., a bank in Hyattsville, Maryland, was robbed by four men. Three of them entered the bank and wore disguises. One robber wore a cap and sweater pulled up over his eyes. This robber is alleged to be Petitioner.

There were some 27 people in the bank at this time, 20 customers and 7 employees. Two of the robbers jumped

over the tellers' counters, one of these two allegedly being Petitioner. Although the bank manager was instructed at FBI meetings to remain calm and *observant* if a robbery occurred, he was unable to describe any clothing or facial features of the two countermen, except that one of them had a wig,[1] even though he observed them in, and leaving, the bank.

The three robbers commandeered a cab and drove to the parking lot of an office building several blocks away; whereat, they 'switched' the cab for another car, which car was involved in an accident leaving the 'switch scene.' The accident attracted some residents of the building who observed the tag number of the car and reported same to the police as a hit and run accident. The car was subsequently shown to have a direct connection with the co-defendent below, Arthur Williams.

FBI agents arrived at the bank within 30 minutes. They interviewed about 25 of the bank customers and employers to obtain facial, clothing and other descriptive elements of the robbers. As to the robber alleged to be Petitioner, a generalized composite description assembled from these interviews of people in the bank was:

Unknown Subject, No. 3

Sex	:	Male
Age	:	25-30 years
Height	:	5 ft. 9 in. to 6 ft.
Clothing	:	Wearing a cap, green turtleneck sweater pulled up over nose, gloves.

The composite description *did not* describe - and therefore no witness in the bank described - (1) prominent facial characteristics of Petitioner, to wit, a fairly heavy mustache

---

[1] A descriptive element germane to one of the other robbers.

and a medium Afro hairstyle,[1a] and (2) prominent, vivid clothing worn by the robber alleged to be Petitioner, to wit, pink pants and a trench coat described by other witnesses at points remote from the bank.

The FBI agents searched the bank, the surrounding bank grounds, and the switch scene area. The agents did not find any guns, caps, hats, ski masks, gloves, pink pants, green sweaters, trench coat, or other articles of clothing. Found at the switch scene were three beer cans which were never produced at trial, one of which had a single fingerprint on it alleged to be Petitioner's.

From the composite description – and apparently from the strangest of coincidences – the FBI assembled an array of 7 photos which included in the same array, Petitioner and co-defendant Williams, and a third suspect. This photographic lineup, over the next few days, was shown to several dozen people.

Pre-Arrest Photo Lineup

Of the several dozen people who viewed the 7 photo array, only 4 people identified Petitioner in any way, and then only a "resemblance" identification:

William Diggs: and Rossi Wilford:	Both worked at a gas station which was a very long block away from the bank, and made *identical identifications* of Petitioner as *strongly resembling* one of three black men waiting by a bus stop near the gas station 30-45 minutes prior to the robbery. One of the men wore pink trousers,

[1a] Petitioner's mustache and Afro were about the same thickness (a) when arrested about a week after the robbery (b) at the corporeal lineup a month later and (c) at trial.

but Diggs and Wilford put said pink pants on different ones of the 3 men.

David Parker: Identified Petitioner as *resembling* one of two men outside the bank before Parker went into the bank.

Cody King: Identified Petitioner as *strongly resembling* a man he saw running to a car at the 'switch scene' at a time sequence after the bank robbery.

As testified to at trial, each of the above witnesses gave an initial description to the FBI prior to seeing the photos:

	Diggs	Wilford	Parker[2]	King
Race	Negro	Negro		Negro
Sex	Male	Male		Male
Age	Mid-20's	25-30		21-28
Height	6 feet	6 feet		6 feet-one inch
Weight	180 lbs.			180-198 lbs.
Build	Medium	Medium		
Hair				black hair (Afro style)
Attire	Pink pants	(same)		trench coat
	high-heeled boots	(same)		no hat

---

[2] Prior to arrest, Parker gave several descriptions of three men who came into the bank, but did not give descriptions of the two men he saw outside the bank. Suffice it to say that he did not describe any of the men outside or inside the bank as having or wearing (a) an Afro hairstyle, (b) mustache, (c) pink pants, or (d) a trench coat.

None of these four witnesses described any of the clothing worn by the robber alleged to be Petitioner - described by the 27 customers and employees inside the bank; to wit, a cap, gloves, and a green turtleneck sweater, *supra*, p. 4.

Petitioner was the only person in the seven photos with a reasonably heavy mustache and a medium Afro hairstyle. At this point, the Justices reviewing this petition are requested to examine a reproduction of the 7-photos included herewith at Appendix A-4, 5. Petitioner is No. 4E in said reproduction.[3]

Not a single one of these four trial witnesses, in their initial interview with the FBI following the robbery, described the robber alleged to be Petitioner as having a mustache and an Afro hairstyle; except King, who described an Afro hairstyle.

None of these four trial witnesses, described the cap and green turtleneck sweater described by persons in the bank.

Not a single one of all of the dozens of witnesses in and out of the bank indicated that any of the 3 robbers wore pink pants and had high-heeled boots (*except Diggs and Wilford who worked together*).

The Corporeal Lineup

In contrast to the 7 photo lineup, the corporeal lineup which was held a month after the robbery, was eminently fair in its composition of participants. Petitioner was No. 8 of 11 participants in the corporeal lineup.

---

[3] These photos were admitted as Government trial exhibits 18A - 18G. The reproduction in the Appendix was produced by making negatives from the original evidence and reproducing the photos with as near as possible the same contrast as the originals.

In addition to Petitioner having a substantial mustache and Afro hairstyle, 3 other participants in the lineup had heavy mustaches and Afro hairstyles, to wit, Nos. 1, 5, and 7, as well as others having Afro hairstyles, to wit, 9 and 10. The Justices are requested to examine a reproduction of a photo of the corporeal lineup, included herewith at Appendix A-6.[4]

19 people, including Diggs and Wilford, viewed the actual corporeal lineup and 7 others later viewed the photo of the lineup (See Appendix A-6) in an attempt to make identifications in connection with the bank robbery. Except for Diggs and Wilford, most of these 26 people were either bank employees or customers in the bank at the time of the robbery.

When faced with a fair lineup containing 4 participants with reasonably heavy mustaches, medium Afro hairstyles, and 2 others with medium Afro hairstyles: *NOT A SINGLE ONE OF THESE 26 PEOPLE IDENTIFIED PETITIONER IN ANY WAY WHATSOEVER - NOT EVEN A WEAK 'RESEMBLANCE.'*

Thus, these 26 people, who were at or near the bank scene and either attended the corporeal lineup or viewed the corporeal lineup photograph, were unable to identify Petitioner in anyway whatsoever, when confronted with a fair lineup having several people similar in appearance to Petitioner. Compare this to the 7 photo array in which Petitioner was the only person with a heavy mustache and Afro hairstyle.

---

[4] This photo was government trial exhibit 22. The reproduction was reproduced in the same manner as the seven photo array, see *supra*, fn. 3.

In-Court Identification

Not a single trial witness positively identified Petitioner as a participant in the robbery.

Not a single trial witness identified Petitioner in any way as being in the bank.

Of the four people who identified Bailey at trial, *all four had previously failed to identify him at either the lineup or from the photo of the corporeal lineup.* Three of these five trial witnesses, Diggs, Wilford, and King, previously made a 'resemblance' identification of Petitioner from the 7 photo array (*supra,* pages 5, 6.) Parker made no trial identification of any type.

Other Evidence

The only evidence the government had over and above the 'resemblance' identifications was a single fingerprint found on one of three beer cans allegedly found at the switch scene some 5 blocks or so away from the bank. This fingerprint was identified as Petitioner's. None of the 3 cans were produced at trial, and the FBI had no idea where they were.

Exculpatory Evidence

Government's Case: The FBI verified that Petitioner was employed by Ronald Kelly Construction Company, and worked the day of the robbery. The government called as its witness, Petitioner's employer, who produced his time records, which revealed Petitioner was on the job at the time of the robbery and that Petitioner indeed worked a full and normal day on the day of the robbery.

Petitioner's Case: Petitioner's wife testified she saw her husband walk towards his job in the morning. His sister testified that he had lunch frequently at her house, a

couple of blocks from the job site, and specifically did so on the day of the robbery.

Petitioner's Status: Petitioner is presently incarcerated at a Federal penitentiary serving a 22-year sentence imposed by the District Court on October 27, 1972.

REASONS FOR GRANTING THE WRIT

FIRST

Petitioner Was Denied Constitutional Due Process of Law When He Was Convicted Solely on "Resemblance" Testimony.

There does not appear to be any Supreme Court holding on convictions obtained solely on "resemblance" identifications in criminal cases. The only significant Court of Appeals case is *United States v. Brooks,* 146 U.S. App. D.C. 1, 449 F.2d 1077 (1971). Yet the Fourth Circuit Court of Appeals wrote no opinion on this novel question.[5]

In *Brooks,* the accused was convicted on stabbing a woman to death on a Washington, D.C. street. No witness saw the actual crime, but there was a continuous chase of the assailant from a few moments after the crime for a substantial time period thereafter. The assailant eluded his pursuers, but was arrested 12 days later. Three

[5] The order issued by the Court of Appeals, See A-2, 3, contains a two-sentence conclusion, which we do not consider an opinion. The first sentence was germane only to a question raised by the co-defendant below, and the second sentence merely parrotted a legal conclusion on identification which was applied to both defendants. In all candor, the identification issue raised by the co-defendant was not meritorious and consumed only 1/2 page of his appeal brief, and 2 people at the bank made positive identifications.

witnesses involved in the chase gave "resemblance" identification testimony and a fourth witness gave "positive" identification testimony. All four gave consistent descriptions of the assailant and his clothing and his physical condition,[6] which descriptions where consistent with witnesses who knew the accused and saw him immediately before and after the chase.

Judge Leventhal, for the Court of Appeals, District of Columbia Circuit, in *Brooks, supra,* on the "resemblance" issue stated:

> ". . . Where the surrounding facts and evidence do not present a case of substantial doubt as to the possibility of a misidentification, where there is an *untainted [positive] identification testimony,* where there is *strong evidence independent of the testimony of resemblance witnesses* showing that defendant was the offender, that combination of strengths in the Government case and weakness of the "resemblance" testimony in contributing to his conviction warrants a finding of harmless error from admission of the resemblance testimony." (146 U.S. App. D.C. 1, 7, 449 F.2d 1077, 1083) (emphasis added).

Such was not the case herein; in Petitioner's case:

(a) There was a substantial possibility of misidentification,
(b) There were no positive identifications,

---

[6] After the chase, the accused's landlady testified his clothing was torn and his hands were cut.

(c) There was no strong and overwhelming independent evidence, to wit, the continuance chain of observations along with consistent descriptions as in *Brooks, supra.*

There was a substantial possibility of irreparable misidentification in this case, see "Reason Second," *infra,* p. 13.

As set forth in the Factual Statement, there were no "positive" identifications placing Petitioner in the bank or any place else.

The prosecutor, without the "resemblance" identifications, did not have an overwhelming or strong case; rather it had no case.[7] In Petitioner's case, there was no chase at all. And the clothing descriptions of the people in the bank were inconsistent and irrenconciliable with those of the people at the gas station and parking lot which were inconsistent and irreconcilable with each other, *supra,* pp. 4, 6. Failure to give an accurate description is recognized as casting doubt on an identification. *United States v. Sanders,* ___U.S. App. D.C. ___, ___F.2d ___, No. 72-1534 (May 17, 1973), *United States v. Harris,* ___U.S. App. D.C. ___, ___ F.2d ___, No. 71-14818 (February 5, 1973).

Resemblance testimony does *not* prove identity. It merely proves resemblance. Webster's Seventh New Collegiate Dictionary (1971) defines "identification" as "an act of identifying"; and defines "identify" as "to establish the identity"; and defines "identity" as "the condition of being the same with something described or asserted." Similarly, Encyclopedic Law Dictionary (1922) defines "identification" as "the establishment of identity" and defines "identity" as "sameness; the state of being the same

[7] The single fingerprint found on one of three beer cans had no convictable substance standing by itself. No one saw the can in Petitioner's hand, no one saw him put the can in the parking lot. There was no evidence of when and how the can got in the parking lot.

as something described; the fact that a person or thing is the same as it is represented or charged to be."

In *Brooks, supra,* both the Court and Government recognized and understood the vital distinction between testimony as to "resemblance" and as to "identification," respectively. The Government there contended that witnesses who testified that a defendant "resembled" the culprit did *not* "identify" him. Agreeing in principle, the court said that:

> "resemblance" testimony projects some uncertainty of the part of the witness . . . The fact that a witness can testify only as to "resemblance" may be taken into account.

Accordingly, the Government perverts language when it twists the words "resemblance" so as to mean the word "identify" in relation to the photographic viewing and trial testimony herein.

Since there was no positive identification herein, and no other evidence of convictable substance, Petitioner was denied constitutional Due Process of Law when convicted solely on "resemblance" testimony.

SECOND

The Composition Of The 7 Photographs Used As An Array For Pre-Arrest Attempts At Identification, Was So Impermissibly Suggestive So As To Give Rise To A Very Substantial Likelihood Of Irreparable Misidentification Under Simmons v. United States, 390 U.S. 377 (1968).

The identification of Petitioner as "resembling" someone near the switch scene, before and after the robbery, was highly improper. Petitioner's photo (See Appendix A-4-E) was the only one depicting a person with a substantial moustache, and an Afro hairstyle. The marked

disparity in appearance of Petitioner, *vis-a-vis* the other 6 photos brought him into very sharp focus as if he had a unicorn.

Such focusing is fatally defective under *Simmons v. United States*, 390 U.S. 337 (1967). Justice Harlan speaking for the Court said:

> "This danger [incorrect identification] will be increased if the police display to the witness only the *picture of a single individual* who generally *resembles the person* he saw, or if they show him the pictures of several persons among which *the photograph of a single such individual* recurs or *is in some way emphasized.*" 390 U.S. at 383, (emphasis added).

A person viewing the 7 photo array herein, (see Appendix A-4, 5) would immediately focus on photo A-4-E, Petitioner's photo, because of the distinctive characteristics he has that the persons in the other photos do not have. So, if the person at the bus stop and switch scene, (or it quite likely was 2 or 3 different persons not known to each other), looked anything like Petitioner, each of the witnesses (Diggs, Wilford, Parker, and King) would probably pick out Petitioner's photo as closest resembling that person(s). From then on, these four witnesses did not retain in their memory the image of the person they saw, but supplanted it with the image of Petitioner in the photo. A phenomena which the Simmons Court recognized:

> Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification (390 U.S. 377, 384).

The clinching evidence of the *Simmons* phenomena in this case is the results of the corporeal lineup. When confronted with a fair lineup, either corporeal or the photo of the lineup, in which the participants were reasonably similar in height and physique, and four[8] had both substantial moustaches and six[9] had medium Afro hairstyles, no one, including the 4 "resemblance" witnesses, identified Petitioner in any way. That a corporeal lineup is normally more accurate than a photo array is recognized by the *Simmons* case.[10] Thus it is patent that all of the "resemblance" identifications from the photo array were based on the manner in which Petitioner's photo was emphasized. *Simmons, supra,* 390 U.S. at 383.

Fundamental requirements of fairness of composition applicable to corporeal lineups must necessarily be requirements of photo arrays. *Foster v. California,* 394 U.S. 440 (1969) is controlling. In *Foster,* a lineup was held to be impermissibly suggestive where the defendant was conspicuous because of his height. 394 U.S. 442, 443. In *Mendoza-Acosta v. United States,* 139 U.S. App. D.C. 143, 430 F.2d 516 (1970), the Circuit Court had no doubt that a lineup was impermissibly suggestive where the defendant was the only lineup participant with a moustache.

---

[8] See A-6, participants 1, 5, 7 and 8, No. 8 being Petitioner.

[9] See A-6 participants 1, 5, 7, 8, 9, and 10.

[10] See fn. 6, 390 U.S. 383, 386.

The suggestive elements of the 7 photo array herein, made it all but inevitable that any of the dozens of witnesses who saw a black man with a moustache and Afro hairstyle, would pick out Petitioner's photo as "resembling" that man because of the moustache and Afro, whether or not he was in fact "the man". *Foster, supra,* 394 U.S. 343. These witnesses from then on retained in their memory "the image of the photograph rather than of the person actually seen, reducing the trustworthiness of [their] subsequent lineup or courtroom identification . . .". *Simmons, supra,* 390 U.S. 384.

THIRD

The Prosecutor's Method Of Obtaining In-Court Identifications Was Constitutionally Improper

The Factual Statement, *supra,* presents a class of recurring situations fraught with the danger of impermissible suggestion which this Court has not yet adjudicated but which is within the wholesome spirit of *Wade, Gilbert, Stovall* and *Simmons*[11] and the broadly-conceived purpose of the Due-Process clause.

Counsel refers to the circumstance, during the testimony of witness before a jury, where the prosecutor herein either (A) first showed the 7 photo array (A-3, 4) to the witness, then asked the witness to pick out the photo he previously picked out, and then with the witness having his cue-card in hand asked him to identify anyone in court connected with the robbery; or (B) alternatively, first, asked the witness whether he made a prior identification from an array

---

[11] *Wade v. United States,* 388 U.S. 218 (1967)
Gilbert v. California, 388 U.S. 263 (1967)
Stovall v. Penna., 388 U.S. 293 (1967)
Simmons v. United States, 390 U.S. 377 (1968)

of photographs and then asked the witness to identify anyone in court connected with the robbery. In either of the two procedures, the prosecutor was permitted to proceed over Petitioner's objection and prior to any challenge by counsel of the in-court identification on cross-examination.

In either situation, the prosecutor put the cart before the horse. He attempted to rehabilitate his witness before challenge or impeachment of the in-court identification, if defense counsel chose to do so. The defense for a variety of strategical reasons in a given case may decide not to challenge an in-court identification on cross-examination; for example where the witness identified someone other than the defendant or the identification is very 'iffy', among other situations. If counsel does not challenge the identification, the prosecutor certainly is not entitled to put in evidence of prior photo or lineup identifications, anymore than a prosecutor can reopen his direct examination if defense counsel decides not to cross-examine any witness who did not hurt his case. Petitioner and co-defendant were for that part of the trial, when the "resemblance" witnesses testified relative to Petitioner, the only two black men in the court and were both seated at counsel table. They are distinctly different in appearance: Petitioner is dark complected, has a mustache and an Afro hairstyle; whereas the co-defendant is light complected, had no mustache and his head was clean shaven.[12]

Thus, the showing of the 7 photo array to some witnesses prior to an attempt at an in-court identification

[12] Petitioner is 4-E, See Appendix A-4. Co-defendant is 4-A.

planted the image of Petitioner's photo (A-4-E) in their minds, and asking other witnesses about their prior identification from the 7 photo array, reminded these witnesses of the person in the photograph they had previously picked out. This amounted to an illegal, impermissible in-court suggestion which irreparably tainted the ensuing in-court identification. Such in-court identification should have been suppressed under *Gilbert, supra.*

FOURTH

The Court of Appeals May Not Affirm Without Opinion Where There Are Substantial Issues And Where Petitioner Was Convicted Solely On Questionable Resemblance Testimony.

When an appellate-court panel affirms without opinion[13] appellant's counsel is greatly disadvantaged. He can hardly explain to his client and both the full court and the Supreme Court, respectively, (a) whether and, if so, to what extent the panel overlooked or misapprehended the facts and the legal points involved in the appeal and (b) whether the panel has departed from and overruled, *sub silentio,* certain established and applicable doctrines.

In a case of this magnitude and of the serious issues raised, counsel respectfully submits that the panel had an obligation to write an opinion informing the counsel, parties, court and profession its *ratio decidendi.* Only if a panel files an opinion, does the full court or the Supreme Court have an adequate basis for considering whether to reverse.

---

[13] The Circuit Court's 2 sentence statement was not an opinion, see fn. 5, *supra.*

At no time did the Government or the panel suggest that any issue raised by counsel for petition is frivolous. *Coppedge v. United States,* 369 U.S. 438, 447, 448 (1962). His presentation of the applicable facts and law is full, true, fair and objective. The action of the panel in failing to discuss any issue is tantamount to a dismissal by panel, on its own motion, without a suggestion - much less a "showing" that the points are frivolous.

Counsel submits that on an appeal taken as a matter of right, the panel should not dispose of substantial-non-frivolous issues, unless it files an opinion which describes the points and the reasons for its rejection.

There are at least five reasons for this contention:

1. *Avoidance of Discouragement of Resort to the Appellate Process.* Rule 40 of the Federal Rules of Appellate Procedure reads in pertinent part:

> (a) A petition for rehearing . . . shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present . . .

Rule 19 of the Rules of the Supreme Court says that a review on a write of *certiorari* will be granted "only where there are special and important reasons therefor" and indicates, *inter alia,* the character of reasons which it will consider:

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . .

Petitioner has a right to file and to have the full court consider a petition for rehearing and a suggestion of the appropriateness of a rehearing *en banc.* Petitioner also

has a *right* to file a petition for *certiorari* with the Supreme Court. While the willingness of either court to hear petitioner further is discretionary with each court, the right to file and have his petition given due consideration, exists. That right, however, is subject to the fulfillment of certain requirements. For example, Rule 40, quoted above, requires that the petition for rehearing "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." A petition for *certiorari,* as Rule 19 states, has a much better basis for success when the petitioner can show that "a court of appeals has rendered a decision in conflict with the decisions of another court of appeals on the same matter."

With respect to the issues of his appeal, petitioner can only point to an affirmance of his convictions. Thus, he is heavily burdened to argue that the panel has "overlooked or misapprehended points of law or fact" or has a view of the law in conflict with its own prior rulings or those of another circuit.

2. *Testing the Initial Tentative Decision.* Chief Justice Roger J. Traynor of the Supreme Court of California has written:

> "In sixteen years I have not found a better test for solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day." "The Work of State

Appellate Courts," 24 U. Chicago L.Rev. 211, 219 (1956).

"Internal Operating Procedures of Appellate Couts," at page 20:

"But appellate judges gain not only by the opportunity of examining the opinions in other cases, but also from the discipline of writing opinions in their own cases. A conscientious appellate judge finds that the research, thought and time required to prepare an opinion worthy of publication increase the likelihood that a just result has been reached. Referring to the fruitful effect of such a process, Justice Frankfurter has said: 'You feel much more responsible—all of us do—if we have to sit down and write out why we think what we think.' Likewise, Chief Justice Hughes has pointed out that 'there is no better precaution against judicial mistakes than setting out accurately and adequately the material facts as well as the points to be decided . . . The importance of written opinions as a protection against judicial carelessness and responsibility is very great.' A Report by a Committee of the Section of Judicial Administration of the American Bar Association (1960-61).

3. *The Principles of Stare Decisis.*

Our system of jurisprudence depends importantly upon *stare decisis.* Certain issues raised by petitioner such as conviction based solely on resemblance testimony and tainted-identification procedures, are of growing importance and involve a substantial aspect of the criminal process.

4. *A symbol of Accountability.* Associate Justice George R. Smith in "A Primer of Opinion Writing, for Fourt New Judges," 21 Ark. L.Rev. 197 at 200, which was used for the 12th Annual Session of the New York University Seminar for Appellate Judges, writes:

> WHY AN OPINION AT ALL?
>
> Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, . . .

5. *Information for Litigants.* Petitioner was sentenced to serve 22 years. He should at least be able to read a full discussion of the points raised in his appeal.

> [An opinion] serves to mollify the litigants. It tells them, their counsel, and the court below why the judgment has been affirmed or reversed. It tells the losing party where and why his arguments were in error. It serves that most important function of seeing that the law not only does justice but shows that it does justice. M. Lasky, Observing Appellate Opinions from Below the Bench. 49 Cal. L.Rev. 831, 835 (1961).

The contention that the panel should state its reasons for rejecting petitioner's points is not a novel one. Several states have provisions in their state constitutions requiring the statement of grounds of decisions. For example: Arizona (Art. VI. Sec. 2); California (Art. VI. Sec. 2); Indiana Art. VII. Sec. 5); Maryland (Art. IV. Sec. 15); Ohio (Art. IV. Sec. 6).

WHEREFORE, Petitioner prays that a writ of *certiorari* issue to review the judgment of the Court below.

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner,

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2445

United States of America,

Appellee,

v.

Barry Bailey,

Appellant.

ORDER

The petition for rehearing containing a suggestion for rehearing *in banc* has been referred to the panel which decided the case and the entire court. No judge eligible to vote thereon has requested a poll on the suggestion for rehearing *in banc.*

In the absence of Judge Kaufman, it is, with the concurrence of Judge Widener.

ORDERED that said petition be, and it is hereby, denied.

For the Court:

/s/
Harrison L. Winter
United States Circuit Judge

/s/ Filed:
July 25, 1973
William K. Slate II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2444

United States of America,

Appellee,

v.

Arthur Williams,

Appellant.

No. 72-2445

United States of America,

Appellee,

v.

Barry Bailey,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued June 6, 1973 Decided June 25, 1973.

Before WINTER and WIDENER, Circuit Judges, and KAUFMAN, District Judge.

Joseph A. Kenary [Court-appointed counsel] for Appellant in No. 72-2444; Nicholas A Addams for Appellant in No. 72-2445; Paul M. Rosenberg, Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Appellee in Nos. 72-2444 and 72-2445.

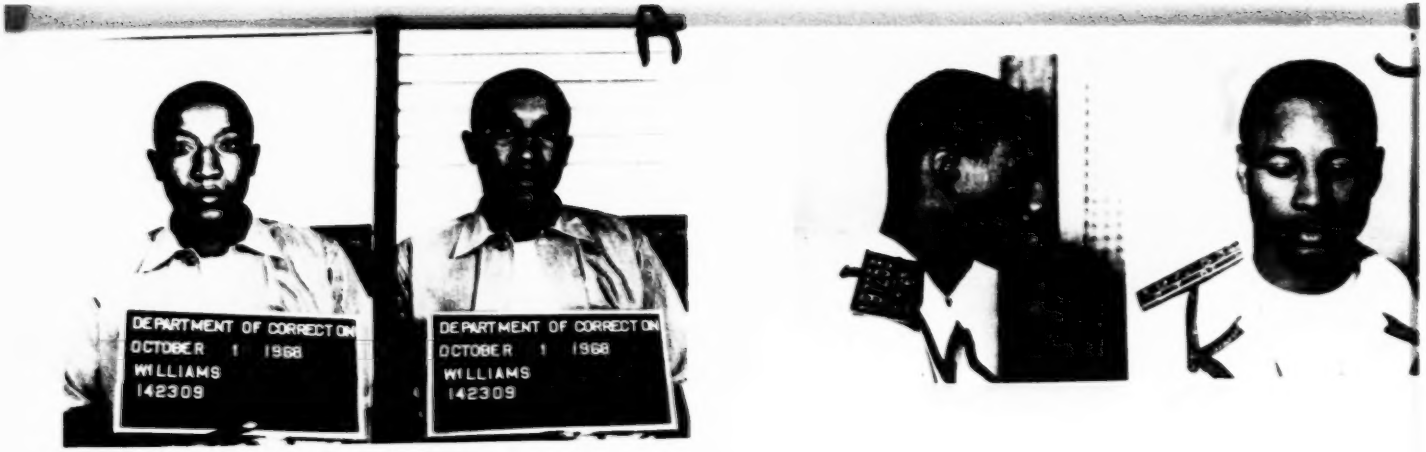
[U.S. Court of Appeals For The Fourth Circuit]

PER CURIAM:

In these appeals, we find no error.

When defense counsel's vigorous cross-examination elicited testimony from Joanne Smith which indicated that a statement she had given previously to the FBI might differ from her testimony at the trial, we think that the district court properly permitted the government to prove the statement to establish that there was in fact no difference. We do not think that the photographic array from which defendants were identified, prior to their arrest, was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification, and we see no other error.

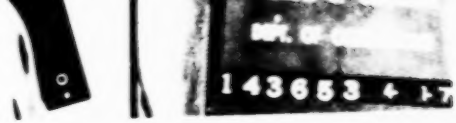
AFFIRMED.


DEPARTMENT OF CORRECTION
OCTOBER 1 1968
WILLIAMS
142309
DEPARTMENT OF CORRECTION
OCTOBER 1 1968
WILLIAMS
142309

E

D

16961
16961


143653

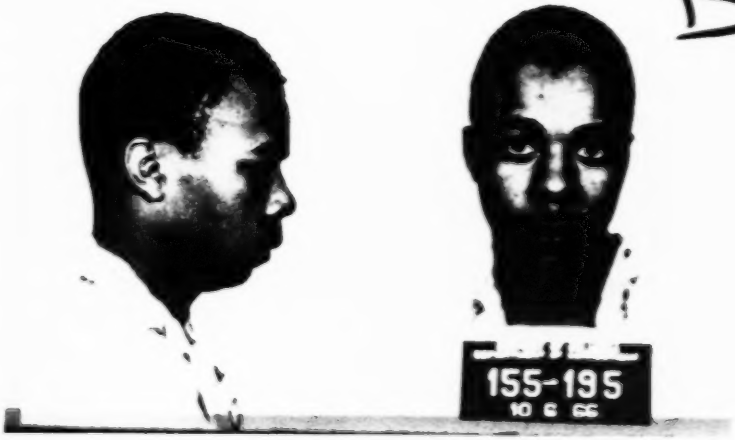
F

19820

G

MONTGOMERY COUNTY POLICE
MARYLAND
MONTGOMERY COUNTY POLICE
MARYLAND

B


155-195